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May 12, 2017

Donna Lieberman  
Executive Director  
New York Civil Liberties Union  
125 Broad Street, 19<sup>th</sup> floor  
New York, New York 10004

Dear Ms. Lieberman:

On January 13, 2017, New York Civil Liberties Union (“NYCLU”) submitted an application to the Joint Commission on Public Ethics (“Commission”) for an exemption from the Source of Funding Disclosure requirements contained in Legislative Law Article 1-A §§1-h(c)(4), 1-j(c)(4) and 19 NYCRR Part 938. The statute provides that whether to grant an exemption is a discretionary determination of the Commission. The Commission considered NYCLU’s application at its meetings on February 28, 2017 and April 25, 2017. The Commissioners reviewed the application and supporting evidence prior to each meeting and discussed and evaluated the merits of the application under the relevant legal standard during the public sessions of each meeting, creating a full record of the basis for its decision. NYCLU’s application for exemption failed to receive a vote of the majority of the Commissioners, therefore, the application was denied. Pursuant to Part 938.5(d), the Commission hereby sets forth the reasons and basis for the denial.

By way of background, the source of funding disclosure provisions increase transparency by providing the public with information about the individuals or entities that attempt to influence government decision-making by funding lobbying activities. Specifically, the source of funding disclosure provisions require lobbyists who lobby on their own behalf and clients of lobbyists, who devote substantial resources to lobbying activity in New York State, to make publicly available each source of funding exceeding \$2,500 for such lobbying.<sup>1</sup>

Under both the statute and the related regulations, entities are permitted to apply for exemptions from disclosure. It should be noted that in enacting the regulatory provisions governing the exemption process, the Commission sought to conform to legislative intent seeking the broadest interpretation in favor of disclosure. (19 NYCRR 938.1). NYCLU applied for an exemption pursuant to Part 938.4(b), which is available for organizations that have exempt

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<sup>1</sup> The source of funding disclosure requirements were first established by the Public Integrity Reform Act of 2011 (“PIRA”) (Chapter 399, Laws of 2011), and most recently amended by Part D of Chapter 286 of the Laws of 2016.

status under Section 501(c)(4) of the Internal Revenue Code of the United States. To qualify for an exemption, NYCLU was required to show that its primary activities involve areas of public concern that create a substantial likelihood that disclosure of its source(s) of funding will cause harm, threats, harassment or reprisals to the source or individuals or property affiliated with the Source. 19 NYCRR Part 938.4; *see also* Legislative Law §§1-h(c)(4), 1-j(c)(4).

Part 938.4 sets out a list of five nonexclusive factors the Commission must consider when determining whether an applicant has made a clear and convincing showing of substantial likelihood of harm, threats, harassment or reprisals to the applicant's source(s) of funding if disclosure were required. It is the Commission's view that unless an applicant makes a persuasive showing under multiple factors it is unlikely to prevail.

After reviewing NYCLU's application, the Commission finds that NYCLU has failed to make the requisite showing in support of its exemption request. As an initial matter, in support of its application, NYCLU primarily relies on its 2015 application for exemption, which was denied. (The 2015 application, which is appended to NYCLU's 2017 application, in turn relied heavily on its 2013 application.) Accordingly, the Commission is relying in large part on, and incorporating herein, its assessment of NYCLU's 2015 application.

The Commission has considered the incidents of "harm, threats, and harassment" identified by NYCLU in support of its application and – as noted above – concluded that for the most part, NYCLU is relying on the same information it previously submitted to the Commission. The only additional information are: (1) two threatening Facebook postings in November 2015 from the same individual who also tried unsuccessfully to post a threatening message directly on the NYCLU's Facebook page; and (2) two threatening letters from 2015 and 2016 sent to the NYCLU which, in its own opinion, were likely submitted by one individual. Moreover, of those letters, only one was sent during the relevant filing period, and it is directed at the NYCLU and similar organizations, not its supporters. Accordingly, the Commission reaffirms its previous findings concerning the same evidence, and concludes that the new evidence does not alter its assessment.

First, the Commission considered the number, recurrence and location of incidents identified in NYCLU's application. The Commission found that many of the incidents were remote in time and geography. Notably, because NYCLU's application is primarily based on the information it proffered in its prior applications, there is limited evidence of incidents in recent years. Further, at least three of the ten incidents mentioned in the 2015 application occurred well outside of the New York area.

Second, NYCLU's application has limited information related to supporters of NYCLU, the American Civil Liberties Union ("ACLU"), and similar organizations. Many supporters attend rallies or publicly identify themselves through social media or other venues, and NYCLU has been unable to demonstrate sufficiently that these supporters experience adverse effects from being associated with entities or causes similar to that of the NYCLU. The majority of the information contained in NYCLU's application pertains to its staff or pertains generally to the ACLU. Thus NYCLU's application fails to establish a nexus between the information it offered in support of its application and the likelihood that supporters, donors, or sources of funding will experience harm, threats, harassment, or reprisals.

Third, in the opinion of this Commission, some of the incidents described by NYCLU rise to no more than constitutionally protected speech as opposed to evidence of a substantial likelihood of harm, threats, harassment or reprisal if disclosure is required.

Finally, NYCLU cites as support a decision of Hearing Officer the Honorable George Pratt relating to NYCLU's 2013 application. In our view, that decision is inapposite as, among other things, it was predicated on a different record.

The burden is on the applicant to establish a "substantial likelihood of harm." This high standard for an exemption is in keeping with the purpose, "...to better inform the public about efforts to influence governmental decision making through increased transparency." (19 NYCRR Part 938.1(4)). To be eligible for the exemption NYCLU's application must contain evidence, by way of specific instances/examples, that disclosure of source(s) of funding would create a substantial likelihood of harm, threats, reprisal or harassment to the source(s) of funding or individuals or property affiliated with such source. The Commission has concluded that NYCLU failed to meet that burden by clear and convincing evidence or by any other evidentiary standard applicable to civil matters. Therefore, NYCLU's application for the exemption is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael K. Rozen", with a stylized flourish at the end.

Michael K. Rozen (on behalf of himself  
and the following Commissioners)

Marvin E. Jacob  
Seymour Knox, IV  
Gary J. Lavine  
J. Gerard McAuliffe, Jr.  
David A. Renzi  
George H. Weissman